## CHONG KUENG YING & ORS. v. LOVIS LAVAGNA

**[F.C. (Azmi L.P., Suffian and H.S. Ong F.JJ.) February 21, 1972]**

**[Kuala Lumpur — Federal Court Civil Application No. 3 of 1971]**

*Practice and Procedure — Appeal — Application for leave to appeal out of time — Whether mistake of legal adviser sufficient ground for granting leave — Federal Court (Civil Appeal) (Transitional) Rules, 1963, r. 13.*

This was an application for leave to appeal out of time. Although the applicants filed their notice of appeal within time, they failed to serve a copy of it on the respondent within time. The ground on which special leave was asked was that the appeallants' legal adviser had made a mistake.

**Held:** the mistake of a legal adviser is not sufficient ground for granting leave.

*Cases referred to:-*

(1) *Gatti* v. *Shoosmith* [1939] 3 All E.R. 916.

(2) *Abdul Majeed* v. *Yeo Chng Tay* [1964] M.L.J. 75.

The following cases were also cited in argument: *Gurbachan Singh* v. *Seagroatt & Campbell (No. 2)* [1962] M.L.J. 370; *Tan Ting Kok* v. *Cheong Lep Keen & Anor.* [1969] 1 M.L.J. 153; *Ramanath & Ors.* v. *Ban Tsan Chuan* [1967] 2 M.L.J. 284; *Ratnam* v. *Cumarasamy & Anor.* [1965] 2 M.L.J. 228; *John Puddicombe Wilkins & 2 Ors.* v. *John Patrick Kenelm Wilkins & Anor.* [1951] M.L.J. 80; *Re Macadam (No. 2)* [1950] 1 All E.R. 659.

FEDERAL COURT.

*David Tay* for the applicants.

*K. A. Menon* for the respondent.

**Suffian F.J.** (delivering judgment of the court): This is an application for leave to appeal out of time.

The applicants filed their notice of appeal within time, but failed to serve a copy of it on the respondent within time.

The matter is governed by rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules which requires the special leave of the Federal Court. It reads:

"No appeal shall, except by special leave of the full court, be brought after the expiration of one month...."

The ground on which special leave is asked is that the applicants' legal adviser has made a mistake. He was under the erroneous impression that under rule 7 it was not for him but for the court to serve the notice of appeal on the respondent. When he realised that it was for him to serve it, he was out of time.

In England the mistake of a legal adviser does not preclude a Court of Appeal from granting leave. That is the law since the amendment of the English R.S.C. in 1909. Before 1909 the English Court of Appeal had no discretion to grant leave if the appellant was out of time owing to a mistake of his legal adviser. See *Gatti v. Shoosmith.*[1]

The law here, however, is the same as the pre-1909 English law: the mistake of a legal adviser is not a sufficient ground for granting leave, see *Abdul Majeed* v. *Yeo Chng Tay.*[2]

We would therefore refuse this application with costs.

*Application refused.*

Solicitors: *Murphy & Dunbar; K. A. Menon & Co.*

---

## KOON HOI CHOW v. PRETAM SINGH

**[O.C.J. (Sharma J.) February 29, 1972]**

**[Ipoh — Originating Motion No. 38 of 1971]**

*Specific Relief — Allegation of professional negligence — Whether applicant had legal right to have act performed — Essential prerequisites — Specific Relief Ordinance, 1950, s. 44.*

*Administrative Law — Mandamus — Whether lies to enforce civil liability arising out of breach of contract.*

This was an application under section 44 of the Specific Relief Ordinance, 1950, for an order of *mandamus.*

An infant met with an accident on August 19, 1970, and as a result of that accident his leg was amputated above the knee. He brought an action for damages against the defendant (Civil Suit No. 168 of 1971). The present application was filed by the defendant, in the said suit, against the respondent, the surgeon who performed the operation on the infant. The applicant alleged that the amputation of the leg was not necessary, the inference being that it was the negligence of the respondent which aggravated the injuries. On being requested by the applicant's solicitor for details of the injuries found on the infant and the treatment given at the hospital, the infant's solicitors authorized the hospital authorities to supply the information. This request was not complied with.

Thus, the applicant, not having received any satisfaction from the hospital authorities, made an application under section 44 of the Specific Relief Ordinance, 1950.

The issue before the court was whether the applicant had succeeded in bringing his case within the purview of section 44 of the Specific Relief Ordinance.

**Held:** the applicant must show not only that he had a legal right to have the act performed, but that the right was so clear and well defined as to be free from any reasonable controversy. In the circumstances of this case, the applicant had failed to show the existence of any legal right to compel the performance of a legal duty cast upon the respondent.

*Per* Sharma J.: "...any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant, cannot be enforced by machinery of a writ of *mandamus* or an order under section 44 of the Specific Relief Ordinance. *Mandamus* does not lie to enforce a civil liability arising out of a breach of contract to enforce rights based on contract. A civil suit for damages or for the enforcement of the civil liability may be the only proper remedy in such a case. Similarly, *mandamus* does not issue to enforce a civil liability arising under torts".

ORIGINATING MOTION.

*Lal Harcharan Singh* for the applicant.

*Abdul Razak* (Senior Federal Counsel) for the respondent.

**Sharma J.** (delivering oral judgment): One Adthinarayanan, an infant, met with an accident on 19th August, 1970, and as a result of that accident his leg was amputated above the knee. He filed an action for damages against Koon Hoi Chow who was the driver of the van which is said to have knocked into the said infant. The claim of the infant is the subject

matter of Civil Suit No. 168 of 1971 (*Adthinarayanan* v. *Koon Hoi Chow*). The defendant in that suit entered an appearance on 9th August, 1971 and no defence has to-date been filed in that suit — I understand with the consent of the solicitors for the plaintiff so that the defendant may get all the information necessary to ascertain whether the amputation of the leg was at all necessary. The present application is filed by Koon Hoi Chow who is the defendant in Civil Suit No. 168 of 1971. Pretam Singh, the respondent in the present application, is the surgeon who performed the operation on the infant. The applicant alleges that the injuries which the infant actually received were not such that should have necessitated the amputation of the leg provided proper care was exercised by the surgeon in charge at the Ipoh Hospital, the inference being that it was the negligence of the respondent which aggravated the injuries. It is somewhat significant that the X-rays which were taken of the infant at the Ipoh Hospital should be "entirely missing from the hospital" and the hospital authorities should "presume" them to be "mislaid or stolen". (See the letter from the orthopaedic registrar dated 12th June, 1971.)

The applicant's solicitors requested the infant's solicitors to get the details of the injuries found on the infant and the treatment given to him while he was in the Ipoh Hospital. The infant's solicitors authorised the hospital authorities to supply the information to the applicant. It seems the respondent required a "written and witnessed" consent by or on behalf of the infant before he could disclose the "patient's medical condition". This was also done but inspite thereof the hospital did not supply the information and took shelter under the decision of the respondent not to issue "any further written reports". It, however, does appear that some report was given by the respondent and a copy of it supplied to the applicant's solicitors.

The applicant not having received any satisfaction from the hospital authorities has now applied under section 44 of the Specific Relief Ordinance 1950. An order under section 44 of the Specific Relief Ordinance is in its nature an order of *mandamus* which is a peremptory order of the court commanding somebody to do that which it was his *clear legal duty* to do. The applicant seeking such an order must have a *legal right to the performance of such duty* by the person against whom the order is sought. I have been told by learned counsel for the applicant that he has not been able to find any case or authority where such an order has in similar circumstances been issued against an officer serving in a hospital. Maybe in other countries the need for such an application has never arisen and therefore no case is to be found in the law reports which may be relevant or on all fours with the present case. Maybe elsewhere such an information is not withheld. The respondent in his affidavit does not say why he was not prepared to give the information. The State, generally speaking, has the reputation of being honest and bravely above board in its conduct and dealings and so should be its officers who serve the public but the matter has all the same to be decided according to law and the applicant has to bring himself within the framework of section 44 of the Specific Relief Ordinance, 1950. I have not been referred to any statute or legislation under which the hospitals and the medical services in this country are established or operate. Such a statute would have thrown some light on the legal rights of the applicant and the legal duties of the respondent. The Medical Act, 1971 does not seem to deal with the hospitals, their staff or patients, nor am I aware of any public health Ordinance or Act or any other legislation to which one could turn for guidance. The respondent is undoubtedly a public servant. The applicant's affidavit does not anywhere say that he has a "personal right" which has been injured or infringed by the respondent.

Five conditions are laid down in section 44 and these conditions are the five provisoes contained in the section which the applicant must satisfy. They are cumulative and all of them must be fulfilled. The question therefore is whether the applicant has succeeded in bringing his case within the purview of section 44 of the Specific Relief Ordinance. Proviso (a) to section 44 requires the applicant to show a personal right which it should be proved would be injured or defeated if the order is not made. In the course of the arguments, I asked the learned counsel for the applicant what was that personal right of the applicant and he very rightly and frankly conceded that the personal right in the context of the application was in truth and substance the right to effectively defend the civil suit. That right, however, is against the plaintiff in the suit and not against the respondent. It has, however, been submitted that that right against the plaintiff is worthless unless there is also an ancillary right against the respondent. I regret that that would be stretching the meaning of the words to limits which are apparently outside the scope and intent of the language of the said proviso. Again it was said that although the applicant has no statutory personal right conferred upon him, he still enjoys the common law right to get the information from the respondent. It was a bare assertion that such a common law right exists. It was not supported by any authority or reference and in the absence of such authority I am not inclined to support the view expressed by the learned counsel. That is not the end of the matter. Proviso (b) requires that the doing or forbearing must be clearly incumbent on the person in his public character. There must be under the law some duty cast upon the public officer. If he does not do the duty, then the court can call upon him to perform that duty. If he does it improperly or in an unauthorised manner the court can call upon him to forbear from doing it in that particular manner. The applicant is in fact trying to ascertain the extent and amount of his liability to the infant. I cannot presume the existence of any legal duty on the part of the respondent unless it is pointed out how that duty arises or exists. No such effort has been made to establish the existence of such duty. If the sole object of the application is to procure evidence in order to assess the limit of the applicant's liability, means exist to call for the records of the hospital by issue of a subpoena to the respon-

dent when the suit comes up for trial and if it is thought that it was the negligence in the performance of his duties as a specialist orthopaedic surgeon that the respondent caused the injuries on the infant to worsen to the ultimate extent and that the sole cause for the amputation of the leg was the negligence of the respondent, the respondent can be made a third party to the suit, provided the applicant so desires. Once the respondent is added as a third party there should be no difficulty as to discovery.

Looked at from another angle, the infant (who was being treated by the respondent) had an implied contract with the respondent that the latter would bestow on and treat the infant with his expert knowledge and all the reasonable care that could be expected under the circumstances. The infant would under the said implied contract be entitled to know what treatment he was being given. If the respondent refused to give him the information, the respondent may be in breach of such contract. Could the infant himself obtain the order under section 44 of the Specific Relief Ordinance on the basis of contract and apart from any other statutory right? My own view is that any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant can not be enforced by machinery of a writ of *mandamus* or an order under section 44 of the Specific Relief Ordinance. *Mandamus* does not lie to enforce a civil liability arising out of a breach of contract or to enforce rights based on contract. A civil suit for damages or for the enforcement of the civil liability *may be* the only proper remedy in such a case. Similarly *mandamus* does not issue to enforce a civil liability arising under torts.

There are four prerequisites essential to the issue of an order under section 44 or of a *mandamus*: —

(1) Whether the applicant has a *clear and specific legal right* to the relief sought;

(2) Whether there is a duty imposed by law on the respondent;

(3) Whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent;

and

(4) Whether the applicant has any remedy, other than by way of *mandamus*, for the enforcement of the right which has been denied to him.

These are the questions, but only some of the questions, which are necessary to be answered in every application for *mandamus*. The applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from any reasonable controversy. The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent.

The applicant has failed to show the existence of any legal right to compel the performance of a legal duty cast upon the respondent. In the circumstances the application is dismissed with costs.

*Application dismissed.*

Solicitors: *L. H. Singh & Co.*